



Billing Code 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 326

RIN 0710-AA82

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: U.S. Army Corps of Engineers, Department of Defense

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is issuing this final rule to adjust its civil monetary penalties (CMP) under the Clean Water Act (CWA) and the National Fishing Enhancement Act to account for inflation.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Brad Guarisco at 202-761-5856 or by e-mail at Brad.A.Guarisco@usace.army.mil or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>

SUPPLEMENTARY INFORMATION:

Background Information

The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 104 Stat. 890 (28 U.S.C. 2461, note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, April 26, 1996, and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act), Public Law

114-74, November 2, 2015, required agencies to annually adjust the level of CMP for inflation to improve their effectiveness and maintain their deterrent effect. The Inflation Adjustment Act required that not later than July 1, 2016, and not later than January 15 of every year thereafter, the Corps must adjust its CMP by the inflation adjustment described in the Inflation Adjustment Act. The inflation adjustment is determined by increasing the maximum CMP or the range of minimum and maximum CMPs, as applicable, for each CMP by the cost-of-living adjustment, rounded to the nearest multiple of \$1. The cost-of-living adjustment is the percentage (if any) for each CMP by which the Consumer Price Index (CPI) for the month of October preceding the date of the adjustment, exceeds the CPI for the month of October in the previous calendar year. The initial catch up adjustments for inflation to the Department of Defense's CMPs were published as an interim final rule in the **Federal Register** on May 26, 2016 (81 FR 33389-33391) and became effective on that date. The interim final rule was published as a final rule without change on September 12, 2016 (81 FR 62629-62631), effective that date.

Using the adjustment criteria provided in the December 14, 2018, Office of Management and Budget Memorandum regarding the “Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015”, the 2019 annual adjustment for inflation will increase the Class I civil penalty under Section 309 of the Clean Water Act to \$21,934 per violation, and the maximum civil penalty increases to \$54,833. The judicial civil penalty under Section 404(s) of the Clean Water Act increases to \$54,833 per day for each violation. Under the National Fishing Enhancement Act, the Class I civil penalty increases to \$24,017 per violation. This rule will apply prospectively to penalty assessments beginning on its effective date, [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Section 4 of the Inflation Adjustment Act directs federal agencies to publish annual penalty inflation adjustments. In accordance with Section 553 of the Administrative Procedures Act (APA), most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the Federal Register. Section 4(b)(2) of the Inflation Adjustment Act further provides that each agency shall make the annual inflation adjustments “notwithstanding section 553” of the APA. According to the December 2018 OMB guidance issued to Federal agencies on the implementation of the 2019 annual adjustment, the phrase “notwithstanding section 553” means that “the public procedure the APA generally requires (*i.e.*, notice, an opportunity for comment, and a delay in effective date) is not required for agencies to issue regulations implementing the annual adjustment.” Consistent with the language of the Inflation Adjustment Act and OMB’s implementation guidance, this rule is not subject to notice and opportunity for public comment.

On August 3, 2011, the Deputy Secretary of Defense delegated to the Secretary of the Army the authority and responsibility to adjust penalties administered by the U.S. Army Corps of Engineers. On July 26, 2018, the Secretary of the Army delegated that authority and responsibility to the Assistant Secretary of the Army for Civil Works who further delegated the authority on October 31, 2018, to the Commanding General of the U.S. Army Corps of Engineers. On January 23, 2019, the Commanding General of the U.S. Army Corps of Engineers delegated that authority and responsibility to the Deputy Commanding General for Civil and Emergency Operations of the U.S. Army Corps of Engineers.

With this rule, the new statutory maximum penalty levels listed in Table 1 will apply to all statutory civil penalties assessed on or after the effective date of this rule. Table 1 shows the calculation of the 2019 annual inflation adjustment based on the guidance provided by OMB (see

December 14, 2018, Memorandum for the Heads of Executive Departments and Agencies, from Mick Mulvaney, Director, OMB, Subject: Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). The OMB provided to agencies the cost-of-living adjustment multiplier for 2019, based on the Consumer Price Index for All Urban Consumers (CPI-U) for the month of October 2018, not seasonally adjusted, which is 1.02522. Agencies are to adjust “the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.” For 2019, agencies multiply each applicable penalty by the multiplier, 1.02522, and round to the nearest dollar. The multiplier should be applied to the most recent penalty amount, i.e., the one that includes the 2018 annual inflation adjustment.

TABLE 1

Citation	Current Civil Monetary Penalty (CMP) Amount established by law	Current CMP Amount in effect prior to this rulemaking	2019 Inflation Adjustment Multiplier	CMP Amount as of [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]
CWA, 33 U.S.C. 1319(g)(2)(A)	\$10,000 per violation, with a maximum of \$25,000	\$21,394 per violation, with a maximum of \$53,484	1.02522	\$21,934 per violation, with a maximum of \$54,833
CWA, 33 U.S.C. 1344(s)(4)	Maximum of \$25,000 per day for each violation	Maximum of \$53,484 per day for each violation	1.02522	Maximum of \$54,833 per day for each violation
National Fishing Enhancement Act, 33 U.S.C. 2104(e)	Maximum of \$10,000 per violation	Maximum of \$23,426 per violation	1.02522	Maximum of \$24,017 per violation

This rule will not result in any additional costs to implement the Corps Regulatory Program because the Class I civil penalties and judicial civil penalties have been in effect since 1990 when the Corps first promulgated regulations regarding such penalties (Class I civil penalties were first established by statute in 1987). This rule merely adjusts the value of current statutory civil penalties to reflect and keep pace with the levels originally set by Congress when the statutes were enacted, as required by the Inflation Adjustment Act. This rule will result in

additional costs to members of the regulated public who do not comply with the terms and conditions of issued Department of the Army permits and either receive a final Class I civil administrative penalty order from a District Engineer or are subject to a judicial civil penalty. The rule increases the minimum and maximum penalty amounts to \$21,934 and \$54,833 for Class I civil administrative penalties under the Clean Water Act, to a maximum of \$54,833 for judicially-imposed civil penalties under the Clean Water Act, and to a maximum of \$24,017 for Class I civil administrative penalties under the National Fishing Enhancement Act. The benefit of this rule will be to improve the effectiveness of Corps civil monetary penalties by maintaining their deterrent effect and promoting compliance with the law.

Regulatory Procedures

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, regarding plain language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps and the use of “you” refers to the reader. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Executive Order 12866 and Executive Order 13563, “Improving Regulation and Regulatory Review”

This rule is not designated a “significant regulatory action” under Executive Order 12866. Accordingly, OMB has not reviewed this rule. Moreover, this final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the Inflation Adjustment Act and OMB guidance. The Corps, therefore, did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

The Department of Defense determined that provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements. This action merely increases the level of statutory civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of Corps-administered statutes and their implementing regulations.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This rule has been deemed not significant under Executive Order 12866, "Regulatory Planning and Review," and is, therefore, not subject to the requirements of Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs."

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Unfunded Mandates Reform Act (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule the mandates of which require spending in any year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 104-113, “National Technology Transfer and Advancement Act (15 U.S.C. Chapter 7)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks”

Executive Order 13045 applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the rule on children, and explain why the regulation is preferable to other potentially

effective and reasonably feasible alternatives. This rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.” This rule does not have tribal implications. The rule imposes no new substantive obligations on tribal governments. Therefore, Executive Order 13175 does not apply to this rule.

Public Law 104-121, “Congressional Review Act”, (5 U.S.C Chapter 8)

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission.

Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin. This rule merely adjusts civil penalties to account for inflation, and therefore, is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

This rule is not a “significant energy action” as defined in Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations, Investigations, Law enforcement, Navigation (Water), Water pollution control, Waterways.

Dated: April 24, 2019. Approved by: _____

Scott A. Spellmon,
Major General, US Army
Deputy Commanding General
for Civil and Emergency Operations

For the reasons set forth in the preamble, the Corps amends 33 CFR part 326 as follows:

PART 326--ENFORCEMENT

1. The authority citation for part 326 continues to read as follows:

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2104; 33 U.S.C. 1319; 28 U.S.C. 2461 note.

2. Amend § 326.6 by revising paragraph (a)(1) to read as follows:

§ 326.6 Class I administrative penalties.

(a) * * *

(1) This section sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act, judicially-imposed civil penalties under Section 404(s) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. Under Section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed \$21,934 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$54,833. Under Section 404(s)(4) of the Clean Water Act, judicially-imposed civil penalties may not exceed \$54,833 per day for each violation. Under Section

205(e) of the National Fishing Enhancement Act, penalties for violations of permits issued in accordance with that Act shall not exceed \$24,017 for each violation.

Table 1 to paragraph (a)(1)

Environmental Statute and U.S. Code Citation	Statutory Civil Monetary Penalty Amount for violations that occurred after November 2, 2015, and are assessed on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]
Clean Water Act (CWA), Section 309(g)(2)(A), 33 U.S.C. 1319(g)(2)(A)	\$21,934 per violation, with a maximum of \$54,833
CWA, Section 404(s)(4), 33 U.S.C. 1344(s)(4)	Maximum of \$54,833 per day for each violation
National Fishing Enhancement Act, Section 205(e), 33 U.S.C. 2104(e)	Maximum of \$24,017 per violation

* * * * *

[FR Doc. 2019-09120 Filed: 5/2/2019 8:45 am; Publication Date: 5/3/2019]